Google Inc. et al v. Egger et al

Donald W. Boecke
Assistant General Counsel

verizon

185 Franklin Street
13th Floor
Boston, MA 02110-1585

Tel (617) 743-5769
Fax (617) 737-0648
donald.w.boecke@verizon.com

ELECTRONICALLY FILED ON 05-19-06

May 19, 2006

THIS IS A VIRTUAL DUPLICATE OF THE ORIGINAL HARDCOPY SUBMITTED TO THE COMMISSION IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS

Mr. Dennis Keschl, Acting Administrative Director
State of Maine, Public Utilities Commission
242 State Street, State House Station 18
Augusta, Maine 04333-0018

RE: MAINE PUBLIC UTILITIES COMMISSION, Request for Commission Investigation into Whether Verizon is Cooperating in Maine With the National Security Agency's Warrantless Domestic Wiretapping Program, Docket No. 2006-274

Dear Mr. Keschl:

Enclosed for filing with the Commission is Verizon Maine's Response to the 10-person complaint referenced above. By copy of this letter, Verizon Maine's Response has been served by electronic mail on Mr. Cowie, as Lead Complainant.

Thank you for your attention to this matter.

Very truly yours,

DW Boecke

Cc: Andrew Hagler, Esq. (w/enc.)
James D. Cowie, Lead Complainant (w/enc.)
Wm. Black, Esq., Office of Public Advocate (w/enc.)
Zachary Heiden, Esq., MCLU (w/enc.)

EXHIBIT A

Dockets.Justia.com

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2006-274

MAINE PUBLIC UTILITIES COMMISSION
Request for Commission Investigation into
Whether Verizon is Cooperating in Maine
With the National Security Agency's
Warrantless Domestic Wiretapping Program

RESPONSE OF VERIZON MAINE TO TEN-PERSON COMPLAINT

The Commission must dismiss the JAMES D. COWIE, *et al.*, ten-person complaint against Verizon New England Inc., d/b/a Verizon Maine, as without merit. The complaint asks the Commission to investigate "whether and to what extent Verizon has cooperated with the National Security Agency's ("NSA") warrantless wiretapping program authorized by President Bush." Complaint at 1. The Complaint also asks the Commission to determine whether Verizon has violated any Maine or federal statute. *Id.* This complaint must be dismissed as "without merit" because (i) the Commission will be unable to adduce any facts relating to these allegations and thus will be unable to resolve the issues raised in the complaint; and (ii) the relief requested (a ban on any such alleged participation by Verizon Maine) implicates issues of national security and is beyond the Commission's power to grant.

I. VERIZON MAINE'S ALLEGED PARTICIPATION IN THE NSA PROGRAM CANNOT BE REVIEWED OR DETERMINED BY THE COMMISSION

The President and the Attorney General have acknowledged the existence of a counter-terrorism program aimed at al Qaeda involving the NSA.[1/] They have also made it

---

1/ *See, e.g.*, Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006); Press Conference of President Bush (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html; Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy plain, however, that the NSA program is highly classified; that the identities of any companies cooperating with the government are highly classified; that the nature of any such cooperation is highly classified; and that any written authorizations or certifications relating to activities under the program also are highly classified. As a result, the Commission will be unable to adduce any information on whether Verizon had any role in the program. Nor will the Complainants be able to provide the Commission with anything more than newspaper articles as a foundation for their concerns. In short, the Commission will have no basis on which it can determine whether the news media's characterizations of the NSA's activities are correct.

As Verizon has already stated, it can neither confirm nor deny whether it has any relationship to the classified NSA program. *See Verizon Issues Statement on NSA Media Coverage*, News Release (May 16, 2006) (attached hereto as Exhibit 1). However, Verizon has further noted that media reports have made claims concerning Verizon that are false. In particular, Verizon has responded to these reports by explaining that it has not turned over data on local calls to the NSA and in fact does not even make records of such calls in most cases because the vast majority of customers are not billed on a per-call basis for local calls. *See id.* As Verizon has also made clear, to the extent it provides assistance to the government for national security or other purposes, it "will provide customer information to a government agency only where authorized by law for appropriately-defined and focused purposes." *See Verizon Issues Statement on NSA and Privacy Protection*, New Release (May 12, 2006) (attached hereto as Exhibit 2). Verizon "has a longstanding commitment to

---

Director for National Intelligence (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

vigorously safeguard our customers' privacy," as reflected in, among other things, its publicly available privacy principles. *See id.*

Verizon is prohibited, however, from providing any information concerning its alleged cooperation with the NSA program. Indeed, it is a felony under federal criminal law for any person to divulge classified information "concerning the communication intelligence activities of the United States" to any person that has not been authorized by the President, or his lawful designee, to receive such information. *See* 18 U.S.C. § 798. Further, Congress has made clear that "nothing in this . . . *or any other law* . . . shall be construed to require disclosure of . . . any function of the National Security Agency, [or] of any information with respect to the activities thereof." 50 U.S.C. § 402 note (emphasis added). As the courts have explained, this provision reflects a "congressional judgment that, in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure." *The Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Security Agency*, 610 F.2d 824, 828 (D.C. Cir. 1979). Similarly, if there were activities relating to the NSA program undertaken pursuant to the Foreign Intelligence Surveillance Act ("FISA"), that fact, as well as any records relating to such activities, must remain a secret under federal law. *See* 50 U.S.C. §§ 1805 (c)(2)(B) & (C). The same is true of activities that might be undertaken pursuant to the Wiretap Act. *See, e.g.*, 18 U.S.C. §2511(2)(a)(ii)(B).

The inability of Verizon to provide information concerning its cooperation, if any, with the NSA program is further demonstrated by the "state secrets" privilege, which the Department of Justice ("DOJ") has invoked in connection with a pending federal court action against AT&T concerning its alleged cooperation with the NSA.[2/] Under that well-

---

[2/] Numerous class action suits have recently been filed against Verizon in various federal and state courts concerning its alleged cooperation with the NSA program. Verizon expects that the DOJ established privilege, the government is entitled to invoke a privilege under which information that might otherwise be relevant to litigation may not be disclosed where such disclosure would be harmful to national security. *See United States v. Reynolds*, 345 U.S. 1, 7-11 (1953). When properly invoked, the state-secrets privilege is an absolute bar to disclosure, and "no competing public or private interest can be advanced to compel disclosure. . . ." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). Further, if the subject matter of a litigation is a state secret, or the privilege precludes access to evidence necessary for the plaintiff to state a prima facie claim or for the defendant to establish a valid defense, then the court must dismiss the case altogether. *See, e.g.*, *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978); *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982).

In the AT&T case, the Department of Justice has invoked the state secrets privilege and set forth its view that claims that AT&T violated the law through its alleged cooperation with the NSA program "cannot be litigated because adjudication of Plaintiffs' claims would put at risk the disclosure of privileged national security information." *See* Memorandum of the United States in Support of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment, filed on May 13, 2006, in *Hepting v. AT&T*, No. C-06-0672-VRW (N.D. Cal.) (attached hereto as Exhibit 3). A hearing on the DOJ's motion is now scheduled for June 23, 2006. The DOJ's rationale applies equally to Verizon's alleged cooperation with the NSA and the information complainants seek here.

Finally, as noted above, Verizon has made it very clear that it cooperates with national security and law enforcement requests entirely within the bounds of the law. The

---

will invoke the state secrets privilege in those cases as well. At a minimum, therefore, the Commission should not go forward without consulting with the DOJ.

assumptions in the popular press that the alleged assistance in connection with the NSA program violates the law are without any basis. None of the federal statutes governing the privacy of telecommunications and customer data forbids telecommunications providers from assisting the government under appropriate circumstances. The Wiretap Act, FISA, the Electronic Communications Privacy Act, and the Telecommunications Act all contain exceptions to the general prohibitions against disclosure and expressly authorize disclosure to or cooperation with the government in a variety of circumstances.[3/] Further, these laws provide that "no cause of action shall lie" against those providing assistance pursuant to these authorizations[4/] and also that "good faith reliance" on statutory authorizations, court orders, and other specified items constitutes "a complete defense against any civil or criminal action brought under this chapter or any other law."[5/] To the extent that state laws do not contain similar exceptions or authorizations,[6/] they are preempted. *See, e.g., Camacho v. Autor. de Tel. de Puerto Rico*, 868 F.2d 482, 487-88 (1st Cir. 1989) (Puerto Rico's constitutional prohibition on wiretapping "stands as an obstacle to the due operation of . . . federal law" and is preempted by the Wiretap Act.).

In sum, there is no basis to assume that Verizon Maine has violated the law. Further, Verizon Maine is precluded by federal law from providing information about its cooperation,

---

3/ *See, e.g.*, 18 U.S.C. §§ 2511(2), 2511(3), 2518(7), 2702(b), 2702(c), 2703, 2709; 50 U.S.C. §§ 1805(f), 1843. For example, 18 U.S.C. § 2709 requires a telephone company to disclose certain information if it receives a "national security letter." Similarly, Section 2511(2)(a) expressly authorizes companies to provide "information, facilities, or technical assistance" upon receipt of a specified certification "notwithstanding any other law."

4/ *See, e.g.*, 18 U.S.C. §§ 2511(2)(a)(ii), 2703(e), § 3124(d)); 50 U.S.C. §§ 1805(i), 1842(f).

5/ *See, e.g.*, 18 U.S.C. §§ 2520(d), 2707(e); § 3124(e).

6/ This would include, for example, Title 15 M.R.S.A. §§ 709 -12, which on their face would seem to provide no ability for federal surveillance in Maine. Similarly, to the extent that the general statement of the importance of telephone customer privacy in 35-A M.R.S.A. § 7101-A has operative effect, it too must yield to the authorizations in federal law.

if any, with this national security matter. Verizon Maine accordingly cannot confirm or deny cooperation in such a program or the receipt of any government authorizations or certifications, let alone provide the other information complainants request. As a result, there would be no evidence for the Commission to consider in any investigation. Moreover, neither the federal nor state wiretapping and surveillance statutes authorize or contemplate enforcement proceedings by the Commission that determine criminal culpability. Nor does the Commission possess the practical tools and ability to construe and enforce state and/or federal criminal statutes, consistent with all constitutional rights and protections. Accordingly, even if the Commission could inquire into the facts – and as discussed above it cannot – the Commission lacks the authority (as well as the practical ability) to reach or resolve the Complainants' seminal allegation – that the activities alleged are unauthorized and, therefore, unlawful. Instead, ongoing Congressional oversight through the Senate and House Intelligence committees, as well as the pending proceedings in federal court that will consider the state secrets issues, are the more appropriate forums for addressing any issues related to this national security program.

II. THE COMPLAINT MUST BE DISMISSED AS WITHOUT MERIT

Section 1302, Title 35-A M.R.S.A. provides the Commission shall dismiss a ten-person complaint found to be "without merit." The Law Court has construed that phrase to mean that dismissal by the Commission is appropriate where "there is no statutory basis for the complaint, *i.e.,* that the PUC has no authority to grant the relief requested…." *Agro v. Public Utilities Commission*, 611 A.2d 566, 569 (Me. 1992). Dismissal of the instant ten-person complaint is warranted, therefore, because the Commission lacks the authority to conduct the investigation, or to determine that the challenged activity violates criminal wiretap statutes.

Respectfully submitted,

VERIZON MAINE

Donald W. Boecke
Its Attorney

185 Franklin Street, 13th Floor
Boston, Massachusetts 02110
617-743-5769

Dated: May 19, 2006

EXHIBIT 1

News Release

Verizon Issues Statement on NSA Media Coverage

May 16, 2006

Media contact:
Peter Thonis, 212-395-2355

NEW YORK -- *Verizon Communications Inc. (NYSE:VZ) today issued the following statement regarding news coverage about the NSA program which the President has acknowledged authorizing against al-Qaeda:*

As the President has made clear, the NSA program he acknowledged authorizing against al-Qaeda is highly-classified. Verizon cannot and will not comment on the program. Verizon cannot and will not confirm or deny whether it has any relationship to it.

That said, media reports made claims about Verizon that are simply false.

One of the most glaring and repeated falsehoods in the media reporting is the assertion that, in the aftermath of the 9/11 attacks, Verizon was approached by NSA and entered into an arrangement to provide the NSA with data from its customers' domestic calls.

This is false. From the time of the 9/11 attacks until just four months ago, Verizon had three major businesses – its wireline phone business, its wireless company and its directory publishing business. It also had its own Internet Service Provider and long-distance businesses. Contrary to the media reports, Verizon was not asked by NSA to provide, nor did Verizon provide, customer phone records from any of these businesses, or any call data from those records. None of these companies – wireless or wireline – provided customer records or call data.

Another error is the claim that data on local calls is being turned over to NSA and that simple "calls across town" are being "tracked." In fact, phone companies do not even make records of local calls in most cases because the vast majority of customers are not billed per call for local calls. In any event, the claim is just wrong. As stated above, Verizon's wireless and wireline companies did not provide to NSA customer records or call data, local or otherwise.

Again, Verizon cannot and will not confirm or deny whether it has any relationship to the classified NSA program. Verizon always stands ready, however, to help protect the country from terrorist attack. We owe this duty to our fellow citizens. We also have a duty, that we have always fulfilled, to protect the privacy of our customers. The two are not in conflict. When asked for help, we will always make sure that any assistance is authorized by law and that our customers' privacy is safeguarded.

####

Copyright 2005 Verizon | Privacy Policy | Site Map | Home

EXHIBIT 2

veri on Products & Services Customer Support About Verizon

Contact us

Site Search

News Center Main Page
News Archive
Media Contacts
Press Kits
Public Policy Issues
Executive Center
Video & Image Feed

Already registere
customized new:
Please sign in.

e-mail

password

Print this do

News Release

Verizon Issues Statement on NSA and Privacy Protection

May 12, 2006

Media contact:
Peter Thonis, 212-395-2355

NEW YORK -- *Verizon Communications Inc. (NYSE:VZ) today issued the following statement:*

The President has referred to an NSA program, which he authorized, directed against al-Qaeda. Because that program is highly classified, Verizon cannot comment on that program, nor can we confirm or deny whether we have had any relationship to it.

Having said that, there have been factual errors in press coverage about the way Verizon handles customer information in general. Verizon puts the interests of our customers first and has a longstanding commitment to vigorously safeguard our customers' privacy -- a commitment we've highlighted in our privacy principles, which are available at www.verizon.com/privacy.

Verizon will provide customer information to a government agency only where authorized by law for appropriately-defined and focused purposes. When information is provided, Verizon seeks to ensure it is properly used for that purpose and is subject to appropriate safeguards against improper use. Verizon does not, and will not, provide any government agency unfettered access to our customer records or provide information to the government under circumstances that would allow a fishing expedition.

In January 2006, Verizon acquired MCI, and we are ensuring that Verizon's policies are implemented at that entity and that all its activities fully comply with law.

Verizon hopes that the Administration and the Congress can come together and agree on a process in an appropriate setting, and with safeguards for protecting classified information, to examine any issues that have been raised about the program. Verizon is fully prepared to participate in such a process.

####

Copyright 2005 Verizon | Privacy Policy | Site Map | Home